Supreme Court, U.S.
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No. 10-683

In the
Supreme Court of the United States

PAUL O. ROHART, M.D.,
Petitioner,

v.

NORTH BROWARD HOSPITAL DISTRICT,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE FOURTH DISTRICT COURT OF APPEAL, FLORIDA

REPLY TO BRIEF IN OPPOSITION

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POINT ONE: CORRECTIONS TO RESPONDENT'S STATEMENT OF FACTS

Respondent states that Dr. Rohart "was at all times acting as an agent and practicing medicine as an agent of the District and the District exercised exclusive control over the method and manner Rohart performed physician services."

This is incorrect.

This issue had been previously decided in *Robinson v. Linzer, D.O.*, 758 So.2d 1163 (Fla. 4th DCA 2000). In this case a physician and his employer, Coastal Emergency Services of Hollywood, Inc. [a predecessor to Phoenix Emergency Medicine of Broward, LLC (PEMB) and under the same ownership] had their summary judgment reversed because the court found that the "Hospital District and Coastal were, by their contract, attempting to create an agency status." The Court found no agency status, because the control the District had over the physician did not support an agency status. The physician had the right to admit and the state had no right to control decisions regarding patient care.

The Court also found that the Coastal contract provided "that the emergency room medical director, who was hired and employed by Coastal, is responsible for the day-to-day management and supervision of the emergency room physicians, Coastal hires and pays the salaries of the emergency room physicians." *Robinson* at 1163.

The Director of the Respondent's emergency room was a PEMB employee who directly supervised the PEMB emergency room physicians as in the *Robinson* case. PEMB hired and paid the salaries of the emergency room physicians as in the *Robinson* case. PEMB scheduled the work of Dr. Rohart. Dr. Rohart had the right to admit patients and make medical decisions without state control.

Dr. Rohart was not an agent of the Respondent, nor was the Respondent in exclusive control over the method and manner Dr. Rohart performed physician services.

Respondent states that "Rohart told Mr. Plass not to sign any settlement papers with the District and that he had a lawyer for him. Rohart also asked Mr. Plass if he would speak with Rohart's attorney."

This is incorrect.

Dr. Rohart did speak with Mr. Wooden, Ms. Plass's spouse, on September 15, 2006. At that time, Mr. Wooden told Dr. Rohart that he executed a settlement agreement, for $200,000.00, with the Respondent on August 11, 2006, and that Dr. Rohart was to be terminated because of Ms. Plass's death. Dr. Rohart, who had no responsibility for his patient's death, was shocked. He did, at that time, ask Mr. Wooden if he would tell Dr. Rohart's attorney about the termination. Mr. Wooden agreed and told Dr. Rohart's attorney the same thing. Both Dr. Rohart and his attorney, Mr. Lon Engel, had signed affidavits to this effect in November of 2006.

Dr. Rohart, by affidavit, has stated that he <u>did not</u> tell Mr. Wooden not to sign a settlement agreement and that he had a lawyer for him. How

could Dr. Rohart tell Mr. Wooden not to execute a settlement agreement, on September 15, 2006, when Mr. Wooden had already told Dr. Rohart that he had executed the agreement on August 11, 2006? The Respondent has produced no evidence from Mr. Wooden stating that Dr. Rohart made the alleged statements.

Respondent states: "Petitioner's assertion that the administration of the lethal dosage of medication was 'intentional' has no support in the record and is one of many egregious allegations Petitioner has made during the pendency of this case."

This is incorrect.

The nurse had given Ms. Plass 10 times the dose that had been ordered. The nurse had to "round up 32 vials of the drug. Plass died in minutes." (Exhibit F of 3rd Amended Complaint).

To "round up 32 vials" of a medication and to infuse it into a patient cannot be an accident. Each vial contained 250 milligrams of the medication, Dilantin. A vial is approximately the size of a salt shaker. A nurse would not accidently give a patient a rapid infusion of 8 grams of Dilantin. Petitioner's statement is not egregious. It is accurate.

POINT TWO: FLORIDA LAW SUPPORTS PETITIONER

The Respondent states that the Fourth District did not affirm the trial court's summary judgment based on sovereign immunity, but that the decision was based solely on tort law. The Respondent states: "Contrary to Rohart's assertion,

the court held that, as an interested third party to the relationship, the health care district could not be held liable for tortious interference."

Because of Respondent's improper and unjustified actions, claiming to be an "interested party" to an employment relationship is not a valid defense for tortious interference.

In *McCurdy v. Collis*, 508 So.2d 380 (Fla. 1st DCA 1987), McCurdy appealed from an order granting summery judgment to J.C. Collis and Exxon with respect to McCurdy's claim of tortious interference with a business relationship. The court reversed in McCurdy's favor:

> "In those circumstances in which there is a qualified privilege to interfere with a business relationship, the privilege carries with it the obligation to employ means that are not improper. *Peacock v. GMAC*, 432 So.2d at 144-145; *Babson Bros. Co. v. Allison*, 337 so.2d 848, 850 (Fla. 1st DCA 1976), cert. denied, 348 So.2d 944 (Fla. 1977). In other word, the privilege does not encompass the purposeful causing of a breach of contract. *Yoder v. Shell Oil Company*, 405 So.2d 743,744 (Fla. 2d DCA 1981); Restatement of Torts (2d), s. 777 (1977)." *McCurdy* at 384.

Respondent purposely and improperly caused Dr. Rohart's employment contract to be breached.

As support for its decision, the District Court in *Palm Beach Cnty. Health Care District v. Professional Medical Education, Inc.* at 1095, states:

"An interested third-party accused of tortious interference is essentially 'interfering' with its own interests. This is not interference; it is freedom of contract." The application of contract law does not support, and actually erodes, the Respondent's argument.

"The right to interfere in contractual relations, as granted to interested parties, is qualified by the obligation of good faith." ... See *Morsani*, 666 So.2d at 657; *Yoder v. Shell Oil Co.*, 405 So.2d 743, 744 (Fla. 2d DCA 1981).

Every contract contains an implied covenant that the parties will perform their respective obligations in good faith and fair dealing. *County of Brevard v. Miorelli Eng'g, Inc.*, 703 So.2d 1049, 1050 (Fla. 1997). Parties cannot contract around the implied covenant of good faith and fair dealing, even if the contract provides that a particular decision is in the sole discretion of one of the parties. *Sepe v. City of Safety Harbor*, 761 So.2d 1182, 1185 (Fla. 2d DCA 2000). "Where the terms of the contract afford a party substantial discretion to promote that party's self interest, the duty to act in good faith nevertheless limits that party's ability to act capriciously to contravene the reasonable contractual expectations of the other party." *Cox v. CSX Intermodal, Inc.*, 732 So.2d 1092, 1097 (Fla. 1st DCA 1999); *Publix Super Markets, Inc. v. Wilder Corp. of Del.*, 876 So.2d 652, 654 (Fla. 2nd DCA 2004). Respondent's arbitrary and capricious acts of forcing Dr. Rohart's two terminations, based upon unverified facts and as a means of subverting his duty to

investigate his patient's unexplained death, were intentional, improper, unjust and unfair.

Dr. Rohart did not have an expectation that he would be forced from his employment for 1) doing his duty as a physician, and 2) speaking to the deceased's patient's spouse. He had an expectation that he would be treated fairly.

The Respondent asserts that *Fla. Tel. Corp. v. Essig* grants the Respondent the right to interfere with the agreement between Dr. Rohart and his employer, Phoenix Emergency Medicine of Broward, LLC, without any consideration for whether or not the Respondent's conduct was proper.

Fla. Tel. Corp. v. Essig does not address the application of a limitation on a claimed privilege, the obligation of an interested party to act properly, justly and fairly.

The facts in the instant case differ from those of the *Fla. Tel. Corp.* case. Dr. Rohart has contested that Respondent was "privileged to interfere ... regardless of the motive."

Parties cannot contract around the implied covenant of good faith and fair dealing, even if the contract provides that a particular decision is in the sole discretion of one of the parties. *Sepe v. City of Safety Harbor* at 1185.

Respondent maintains that Dr. Rohart's reliance upon *Morsani* and *Burger King* is misplaced because they were decided at the dismissal stage and not at summary judgment. Both *Morsani* and *Burger King's* substantive law is recognized and relies upon *McCurdy v. Collis*, 508 So.2d 380, 384 (Fla. 1st DCA 1987) which is a reversal of a summary judgment

that states where there is a qualified privilege to interfere with a business relationship, the privilege carries with it the obligation to employ means that are not improper.

The Respondent states that "the record was totally devoid of any evidence that the District employed means that were improper." This is incorrect. The Petitioner did produce evidence, but it was ignored. Also, after being ordered by the court, the Respondent refused to respond to a single discovery request for a year prior to its motion for summary judgment.

POINT THREE: PUBLIC POLICY REQUIRED THE PETITIONER TO INVESTIGATE

Respondent claims that § 395.0197, Fla. Stat. dictates that only a risk manager in a hospital is to conduct any investigation into adverse medical incidents, and that the Petitioner "was acting contrary to Florida law when he launched his own investigation."

Actually, Florida law and public policy require the Petitioner to investigate. Florida is one of the few states that explicitly mandate the participation of physicians in adverse medical incident reporting programs. According to §395.0197(1)(e), Fla. Stat., it is " . . . *the affirmative duty of all health care providers and all agents and employees of the licensed health care facility to report adverse incidents* . . ." An unexplained death of a patient, in the Respondent's emergency department, would require that the patient's physician investigate to

determine the cause of death, and to determine if the death was an adverse incident.

§395.0197, Fla. Stat., does not state that a physician cannot investigate the unexplained death of a patient.

Petitioner references § 456.0575, Fla. Stat., and § 765.401(1)(b), Fla. Stat., to support that the Petitioner had a right to talk to the deceased patient's spouse, and that termination for talking to the deceased patient's spouse was unjustified. There is nothing disingenuous about this.

POINT FOUR: RESPONDENT WAS NOT THE SOURCE OF PETITIONER'S EMPLOYMENT RELATIONSHIP

The Respondent uses *Genet Co. v. Annheuser-Busch, Inc.*, 498 So.2d 683 (Fla. 3rd DCA 1986) to support its claim that the Respondent was "the source of the business relationship between Rohart and PEMB" and also an interested party.

The 11th Circuit Court of Appeals, in reviewing the issue of conduct of an interested party and responding to the *Genet* case, has stated: "[t]he significant inquiry to determine the privilege of justification is whether the means employed are not proper." *KMS Restaurant Corp. v. Wendy's Intern., Inc.*, 361 F.3d 1321, 1327 (11th Cir. 2004). The *KMS* Court found that actions alleging tortious interference for an improper purpose, as opposed to cases in which no assertion of impropriety is made, raise the question of whether the interfering party has gone beyond its

limited and qualified privilege. The *KMS* Court remanded the case with the message that "further proceedings should take as given that use of improper methods may support a tortious interference claim even when the defendant did not act solely out of malice." *KMS* at 1328.

> "As to the justification or privilege element, when the district court first granted summary judgment for *Wendy's* in July 1998 it reasoned that *Wendy's* could not be held liable for tortious interference because as the source of the business opportunity it was privileged to interfere. In reaching that conclusion, the district court relied on *Genet Co. v. Annheuser-Busch, Inc.*, 498 So.2d 683 (Fla. 3d DCA 1986), a case in which a franchisor, motivated entirely by business considerations, failed to approve a franchisee's proposed transfer, and was held to have acted within the scope of its privilege. *Id.* at 685.
>
> In KMS' first appeal, we surveyed the relevant Florida case law and said: "[W]e are of the opinion that a franchisor's privilege is limited and qualified. Whether the franchisor has gone beyond its limited and qualified privilege is generally a question for the trier of fact." *KMS I,* No. 98-5336,at 7-12, 2000 WL 177629. We remanded for further proceedings. *Id.* at 12, 14, 2000 WL 177629." *KMS* at 1325-26.

The Respondent claims that *Albritton v. Gandy* does not apply to the instant case "because the District had the right to request Rohart's termination." The verbiage in *Albritton* is specific: "In the instant case a county commissioner does not have the authority to hire and fire employees on behalf of the county. Rather the person with such authority is the county commissioner. Therefore, it cannot be said that Albritton is a party to the employment relationship, and an action for tortious interference may be filed against Albritton." *Albritton v. Gandy*, 531 So.2d 281, 388 (Fla. 1st DCA 1988); *King v. State of Florida*, 650 F.Supp.2d 1157, 1168 (N.D. Fla. 2009). Only Dr. Rohart's employer, Phoenix Emergency Medicine of Broward, LLC had the power to hire and fire Dr. Rohart, as evidenced by his employment by PEMB, and the two termination letters he was issued by Phoenix Emergency Medicine of Broward, LLC. Respondent did not have the authority to hire or fire Dr. Rohart and could, therefore, not be a party to the employment relationship.

POINT FIVE: THE FOURTH DISTRICT COURT OF APPEAL AFFIRMANCE IS A DENIAL OF DUE PROCESS AND EQUAL PROTECTION

Respondent ignores the issue that a court applying incorrect law to admitted facts is a denial of due process and equal protection. *Mathews v. Metropolitan Life Insurance Co.*, 89 So.2d 641, 642 (Fla. 1956).

The verbiage of *Palm Beach County Health Care District* case specifically invokes absolute immunity for tortious interference:

> "As a caretaker of public money raised by taxes, the District has an interest in insuring that public funds are spent for a proper purpose and in seeing that the money is spent wisely and prudently. To allow the **tort of interference** to apply in this case would be to discourage the District from being an aggressive caretaker of public funds. Application of the tort to a situation involving a government agency's expenditure of funds 'would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties.' *Gregoire v. Biddle,* 177 F.2d 579, 581 (2nd Cir. 1949)(Hannd, J.) (in which the court discussed the doctrine of **absolute immunity** for the executive branch of government); see *McNayr*, 184 So.2d at 431 n. 12 (quoting Gregoire with approval). **For this reason, PME could not maintain a cause of action for tortious interference against the District.**" *Palm Beach Health Care District v. Prof. Med Educ.*, 13 So.3d 1090, 1094-95.

McNayr v. Kelley, 184 So.2d 428 (Fla. 1966) is a Florida Supreme Court case that addresses the question of absolute immunity. Footnote 12 is a quote of Justice Hand, concerning absolute immunity, which "effectively presents and disposes of

the arguments on both sides that it is again quoted in the footnote of this opinion." *McNayr* at 431.

Palm Beach Health Care District v. Prof. Med Educ. at 1095 specifically applies absolute immunity to the District. The above verbiage does not include defamation. Tortious interference is specified. Defamation is not a claim in the instant case.

The Fourth District would not have included citations if it did not want them to be included in the "four corners" of its decision. The Fourth District wanted its decision to rest on the law in these two cases.

Respondent states that Petitioner's request for an opinion from the Fourth District was unjustified because "no conflict was present in" the decision. Of course there were conflicts and there was a legitimate basis for Supreme Court review. Why have a rule allowing a request for an opinion if it is to be ignored?

"It seems to be settled law of this state that the duty of a court to apply to admitted facts a correct principle of law is such a fundamental and essential element of the judicial process that a litigant cannot be said to have a remedy by due course of law ... if the judge fails or refuses to perform that duty." *State v. Smith*, 118 So.2d 792, 795 (Fla. 1st DCA 1960); *Mathews v. Metropolitan Life Insurance Co.*, 89 So.2d 641, 642 (Fla. 1956). If the court does not apply a "correct principle of law" to the admitted facts then Florida law acknowledges that due process and equal protection have been denied. **A denial of a request for an opinion, when due process and equal protection have**

been denied, is also a denial of due process and equal protection.

CONCLUSION

The Court should grant the Petition. If the Court does not grant plenary review, it should summarily reverse the Fourth District Court of Appeal decision and remand the case to the Circuit Court for further proceedings.

Respectfully submitted,

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